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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

EZEQUIEL PENA-VERA,

Defendant.

Case No. 2:17-cr-00361-HDM-NJK  
2:19-cv-00271-HDM

ORDER

Before the court is the defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 37). The government has responded (ECF No. 45), but the defendant did not reply.

On November 8, 2017, a grand jury returned an indictment against the defendant, charging him with a violation of 8 U.S.C. § 1326, deported alien found unlawfully in the United States. On April 24, 2018, the defendant entered into a plea agreement and pled guilty to the charge of being a deported alien found unlawfully in the United States. On September 11, 2018, the court sentenced defendant to an eighteen (18) month term of imprisonment, with credit for time served. A direct appeal was not filed.

On February 12, 2019, defendant filed the instant § 2255 motion (ECF No. 37). The government argues that defendant's motion is precluded under the terms of the plea agreement.

A federal inmate may move to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, if: (1) the sentence was imposed in violation of the Constitution or

1 laws of the United States; (2) the court was without jurisdiction to impose the sentence;  
2 (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is  
3 otherwise subject to collateral attack. *Id.* § 2255(a); *see also United States v. Berry*, 624  
4 F.3d 1031, 1038 (9th Cir. 2010).

#### 5 **A. Grounds One and Two**

6 Defendant's first ground for relief asserts that *Sessions v. Dimaya*, 138 S.Ct. 1204  
7 (2018), recognized a new right that is retroactively applicable to his case on collateral  
8 review. He asserts that in light of this new right, his prior deportation is invalid because  
9 his prior conviction for grand theft from a person cannot serve as a valid basis for his  
10 removal. Defendant's second ground for relief asserts that he was not afforded his right  
11 to administratively appeal his deportation order in 2008, which improperly deprived him  
12 of judicial review.

13 The government argues first that the defendant waived his right to collaterally  
14 attack his prior removal by pleading guilty pursuant to the Plea Agreement, and  
15 nonetheless, that the *Dimaya* decision has no bearing on his case.<sup>1</sup>

16 The Plea Agreement states:

17 The defendant knowingly and expressly waives: (a) the right to appeal any  
18 sentence imposed within or below the applicable Guideline offense level as  
19 determined by the parties; (b) the right to appeal the manner in which the  
20 Court determined that sentence on the grounds set forth in 18 U.S.C. §  
21 3742; and (c) the right to appeal any other aspects of the conviction under  
22 28 U.S.C. § 1291 or sentence. The defendant also knowingly and expressly  
23 waived all collateral challenges, including any claims under 28 U.S.C. §  
24 2255, to his conviction, sentence, and the procedure by which the Court  
adjudicated guilt and imposed sentence, except non-waivable claims of  
ineffective assistance of counsel.

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25 <sup>1</sup> In *Dimaya*, the Supreme Court held that 18 U.S.C. § 16(b), which deals with "crime[s]  
26 of violence," is unconstitutionally vague. However, the defendant's offense of grand theft  
27 from a person is categorized as a *theft* offense, not a *crime of violence*, and therefore  
28 *Dimaya* has no effect on the defendant's case. Because *Dimaya* does not apply to  
defendant's case, his assertion that it renders his original removal invalid, is without merit.

1 (ECF No. 25 at 12-13.)

2 The right to collaterally attack a conviction is statutory and may be waived. *United*  
3 *States v. Abarca*, 685 F.2d 1012, 1014 (9th Cir. 1993). A defendant's waiver of a right to  
4 collateral attack is generally enforceable if "(1) the language of the waiver encompasses  
5 the defendant's right to appeal on the grounds claimed on appeal, and (2) the waiver is  
6 knowingly and voluntarily made." *United States v. Nunez*, 223 F.3d 956, 958 (9th Cir.  
7 2000) (internal quotation marks omitted). Courts will enforce the plain language of a plea  
8 agreement if it is clear and unambiguous on its face. *See id.*

9 The waiver in the defendant's Plea Agreement encompasses this Motion and is  
10 clear and unambiguous. Further, the defendant makes no argument that his guilty plea  
11 was not knowingly and voluntarily made. Accordingly, the Court finds that the defendant,  
12 pursuant to the Plea Agreement, waived all collateral challenges to his conviction, except  
13 non-waivable claims of ineffective assistance of counsel.

#### 14 **B. Ground Three**

15 Defendant's third ground for relief asserts ineffective assistance of counsel related  
16 to his immigration counsel's representation during his removal proceeding. Defendant  
17 also makes a general assertion that his counsel failed to file a direct appeal in the instant  
18 case.

##### 19 **1. Immigration Counsel**

20 "Ineffective assistance of counsel in a deportation hearing is a denial of due  
21 process under the Fifth Amendment if the proceeding was so fundamentally unfair that  
22 the alien was prevented from reasonably presenting his case." *Lopez v. INS*, 775 F.2d  
23 1015, 1017 (9th Cir. 1985). To make out an ineffective assistance claim, an immigrant  
24 must show (1) that counsel's performance was deficient, and (2) that counsel's deficiency  
25 caused prejudice. *Mohammed v. Gonzales*, 400 F.3d 785, 793-94 (9th Cir.  
26 2005). Prejudice only results when counsel's performance is "so inadequate that it may  
27 have affected the outcome of the proceedings." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th  
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1 Cir. 1999).

2 The defendant argues that he had ineffective assistance of immigration counsel  
3 during his removal proceedings because (1) counsel failed to challenge the immigration  
4 judge's determination that he had been convicted of an aggravated violent felony and (2)  
5 counsel failed to research the law and the facts as they pertained to petitioner's case and  
6 therefore failed to properly present the case.

7 A 2255 motion is not the appropriate mechanism for raising an ineffective  
8 assistance of counsel claim related to the defendant's immigration counsel, because  
9 there is a "lack of sufficient evidentiary record as to what counsel did, why it was done,  
10 and what, if any, prejudice resulted." See *Correa-Rivera v. Holder*, 706 F.3d 1128, 1130  
11 (9th Cir. 2013) (citing *Iturribarria v. INS*, 321 F.3d 889, 896 (9th Cir. 2003)). "Indeed, as  
12 a practical matter, a motion to reopen [removal proceedings] is the only avenue ordinarily  
13 available to pursue ineffective assistance of counsel claims." *Id.* Accordingly, because  
14 a 2255 motion is not the proper avenue for asserting an ineffective assistance of counsel  
15 claim in relation to the defendant's immigration counsel, this ground is therefore denied.

## 16 **2. District Court Counsel**

17 Ineffective assistance of counsel is a cognizable claim under § 2255. *Baumann v.*  
18 *United States*, 692 F.2d 565, 581 (9th Cir. 1982). In order to prevail on a such a claim,  
19 the defendant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687  
20 (1984). First, the defendant must show that his attorney's performance fell below an  
21 objective standard of reasonableness. *Id.* at 687-88. "Review of counsel's performance  
22 is highly deferential and there is a strong presumption that counsel's conduct fell within  
23 the wide range of reasonable representation." *United States v. Ferreira-Alameda*, 815  
24 F.2d 1251, 1253 (9th Cir. 1986). Second, the defendant must show that the deficient  
25 performance prejudiced his defense. *Strickland*, 466 U.S. at 687. This requires showing  
26 that "there is a reasonable probability that, but for counsel's unprofessional errors, the  
27 result of the proceeding would have been different. A reasonable probability is a  
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1 probability sufficient to undermine confidence in the outcome.” *Id.* at 694. The defendant  
2 must establish both deficient performance and prejudice in order to prevail on a § 2255  
3 claim. *United States v. Thomas*, 417 F.3d 1053, 1056 (9th Cir. 2005).

4 Defendant asserts that counsel was ineffective for failure to file a direct appeal.  
5 Defendant’s claim is without merit due to his entry into the Plea Agreement and evidence  
6 in the record that the defendant “never requested that [counsel] file an appeal.” (See ECF  
7 No. 45-1 at 5.) The defendant did not receive ineffective assistance of counsel for  
8 counsel’s failure to file a direct appeal because he waived his right to appeal in the Plea  
9 Agreement. See *United States v. Stearns*, 68 F.3d 328, 330 (9th Cir. 1995) (stating that  
10 if plea agreement itself waived right to appeal, then probably no ineffective assistance  
11 claim for failure to file appeal). Further, when asked by counsel if the defendant wished  
12 to pursue a direct appeal, he informed his counsel that he did not. (See ECF No. 45-1 at  
13 5.) Based upon the record before the court, counsel was not ineffective for failure to file  
14 a direct appeal because the defendant waived his right to appeal and did not request that  
15 his counsel file a direct appeal.

16 The defendant’s third ground for relief is hereby denied.

17 For the foregoing reasons, defendant’s motion to vacate, set aside, or correct  
18 sentence pursuant to 28 U.S.C. § 2255 (ECF No. 37) is hereby **DENIED**.

### 19 **C. Certificate of Appealability**

20 The standard for issuance of a certificate of appealability calls for a “substantial  
21 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). The Supreme Court  
22 has interpreted 28 U.S.C. § 2253(c) as follows: “Where a district court has rejected the  
23 constitutional claims on the merits, the showing required to satisfy § 2253(c) is  
24 straightforward: The petitioner must demonstrate that reasonable jurists would find the  
25 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*  
26 *McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074, 1077-79  
27 (9th Cir. 2000). The Supreme Court further illuminated the standard for issuance of a  
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1 certificate of appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated  
2 in that case:

3 We do not require petitioner to prove, before the issuance of a COA, that  
4 some jurists would grant the petition for habeas corpus. Indeed, a claim  
5 can be debatable even though every jurist of reason might agree, after the  
6 COA has been granted and the case has received full consideration, that  
7 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court has  
8 rejected the constitutional claims on the merits, the showing required to  
9 satisfy § 2253(c) is straightforward: The petitioner must demonstrate that  
10 reasonable jurists would find the district court’s assessment of the  
11 constitutional claims debatable or wrong.”

12 *Miller-El*, 537 U.S. at 322 (quoting *Slack*, 529 U.S. at 484).

13 The court has considered the issues raised by defendant, with respect to whether  
14 they satisfy the standard for issuance of a certificate of appeal, and the court determines  
15 that none meet that standard. The court therefore denies a certificate of appealability in  
16 this case.

17 **D. Conclusion**

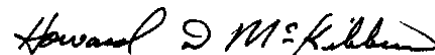
18 For the reasons set forth above, it is hereby ordered that the defendant’s motion  
19 to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (ECF No. 37) is  
20 **DENIED.**

21 It is further ordered that a certificate of appealability is **DENIED.**

22 The Clerk of the Court shall enter judgment accordingly.

23 **IT IS SO ORDERED.**

24 DATED: This 8th day of August, 2019.

25 

26 UNITED STATES DISTRICT JUDGE